IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
JUN 16 1976
MICHAEL RODAK, JR., CLERK

No. 75-1848

LEROY R. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

The petitioner, LEROY R. JOHNSON, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 15, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming petitioner's conviction

for an alleged violation of 18 United States Code, Section 1001, appears as appendix "A", but is yet unreported. There was no opinion rendered by the United States District Court for the Northern District of Georgia, Atlanta Division, in which petitioner was tried and convicted.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on April 15, 1976. A petition for rehearing, with suggestion for rehearing *en banc*, was tendered but not filed by the Court of Appeals. The facts pertaining to the tender of the petition of rehearing, which facts justify this Court permitting this petition to be filed out of time are made to appear in the affidavit of HOWARD MOORE, JR., counsel for the petitioner, appended hereto as Exhibit "B". The affidavit of HOWARD MOORE, JR. shows that the refusal to receive and file the petition for rehearing was attributable to mishandling in the Clerk's Office of the Court of Appeals for the Fifth Circuit or other improvident causes. The judgment of the Court of Appeals for the Fifth Circuit appears as Exhibit "C".

The jurisdiction of the Court is invoked under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether consistent with the emerging standards to mediate the rigors of perjury prosecutions announced in *Bronston v. United States* 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed 2d 568 (1973), petitioner may be

prosecuted under Section 1001, 18 United States Code, for making a statement which is not material on its face to a concluded criminal tax audit.

2. Whether the decision to affirm the petitioner's conviction departs so drastically from other decisions of the Fifth Circuit Court of Appeals in other prosecutions under 18 United States Code, Section 1001, as to make exercise of the supervisory power of this Court appropriate in order to provide equality of treatment to comparably situated litigants.

CONSTITUTIONAL PROVISIONS INVOLVED:

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

STATUTES INVOLVED:

18 United States Code, Section 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The petitioner was convicted in the United States District Court for the Northern District of Georgia, Atlanta Division, for an alleged violation of 18 United States Code, Section 1001, knowingly and willfully making a false statement. The conviction occured on January 29, 1975. (R. 443)'* The action was tried by jury, before the Honorable Newell Edenfield, United States District Judge, presiding. Petitioner appealed from the final judgment of conviction, the denial of the motion in arrest of judgment, motion for a new trial, and motion for judgment of acquittal to the United States Court of Appeals for the Fifth Circuit. The denial of the aforesaid motions occurred on June 27, 1975. (R. 504). Sentence of one (1) year in the custody of the Attorney General was imposed on June 27, 1975 (R. 505). The petitioner was ordered to serve sixty (60) days of the sentence with the balance to be served on probation without supervision (R. 505). The sentence was ordered stayed pending further orders of the Court (R. 505), and the petitioner released upon his own recognizance pending appeal and is presently at liberty.

Notice of appeal was timely filed on June 27, 1975 (R. 506). The case was thereafter docketed in the Court of Appeals and the time in which the petitioner could file his brief on appeal extended by orders of that Court from September 2, 1975, to and to include October 20, 1975.

The Court of Appeals published its opinion affirming petitioner's conviction on April 15, 1976. On April 23, 1976, counsel for the petitioner called the Criminal

*The transcript of proceedings in the record on appeal.

Appeals Expediter for the Fifth Circuit who has the authority under Fifth Circuit Rule 10(a)(6) to provisionally authorize an extension of the time for filing a petition for rehearing and requested that the time in which the petition for rehearing could be filed be enlarged from April 29, 1976, to and to include May 11, 1976. (Appendix B, at 2). The Criminal Appeals Expediter agreed that the requested extension was reasonable and, accordingly, on April 23, 1976, counsel for petitioner prepared a formal motion for such extension and mailed the same to the Clerk for the Fifth Circuit Court of Appeals. (Appendix B, at 2).

On May 10, 1976, an original and 24 copies of the petition for rehearing and suggestion for rehearing *en banc* on behalf of the petitioner was received in the Clerk's Office (Appendix B, at 2). Upon receipt of the petition for rehearing, a deputy clerk for the Fifth Circuit called counsel for the petitioner and related that the motion for an extension had not been received, and, thus, the mandate of the court had issued on May 7, 1976. The deputy clerk advised further that petitioner should file a motion to recall the mandate and for leave to file the petition for rehearing out of time, which motions were mailed to the Clerk on May 10, 1976. On May 21, 1976, the Court of Appeals denied both motions. Upon being informed of the denial of the motions to reconsider and for leave to file petition out of time, on May 1976, the petitioner filed a motion for reconsideration and attached US Postal Form 1510, which was not available when the initial motions for leave to file out of time and to recall the mandate were initially filed. US Postal Form 1510 showed that the motion dated April 23, 1976, had indeed been received by the Clerk. (Appendix B, at 1b).

On June 3, 1976, the Court of Appeals denied the motion for reconsideration, thereby permanently foreclosing petitioner from having his petition for rehearing and suggestion for rehearing *en banc* from being heard in that court.

STATEMENT OF FACTS

A. Basic Biographical Data:

The basic biographical data relating the life and achievements of the petitioner, LEROY R. JOHNSON, crucial to the issues were amply summarized by Special Agent, Benjamin McMakin, Jr., in his Final Prosecution Report, approved for forwarding to the Regional Counsel Southeast Region, Internal Revenue Service, August 24, 1973. Special Agent McMakin stated:

> "LEROY REGINALD JOHNSON was born July 28, 1928, in Atlanta, Georgia. He graduated from MOREHOUSE COLLEGE in Atlanta in 1949, obtained a master's degree in political science in 1951 and a law degree from NORTH CAROLINA COLLEGE in Durham, North Carolina, in 1957.[1] Prior to entering into his private law practice, JOHNSON was employed as a criminal investigator with the FULTON COUNTY SOLICITOR GENERAL'S office. JOHNSON is married to the former CLEOPATRA WASHINGTON and has one dependent son, MICHAEL, age 21.

[1]See *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir., 1951), for the history and development of North Carolina College, now North Carolina Central University, as a separate and equal law school for Blacks.

Reputation in Community

JOHNSON has been a member of the GEORGIA SENATE since 1962 when he become Georgia's first black senator in 92 years. As the Senator from the 38th District, which includes the city of Atlanta, JOHNSON has emerged as a dominant force in the GEORGIA SENATE and is often reputed to be the most politically powerful black man in Georgia and in the South. Countless articles have been written about his power and influence in Georgia politics, and this influence recently helped him get appointed Chairman of the Senate Judiciary Committee, one of the most prestigious positions in the GEORGIA SENATE. JOHNSON also entered the national political spotlight in April 1972, when he was appointed associate national campaign director for Senator EDMUND MUSKIE'S 1972 presidential campaign (W4-26). In March of this year, JOHNSON announced his candidacy in the October election for the office of Mayor of Atlanta. Since that time JOHNSON has run a head to head race with the present Vice Mayor of Atlanta, MAYNARD JACKSON.

Nature of Business

Besides a private law practice which has benefited greatly from his political influence, JOHNSON'S business interests have ranged from a partnership in a beer and wine package store to the promotion of the financially successful MUHAMMAD ALI (aka CASSIUS CLAY)[2] vs. JERRY QUARRY boxing match. . . ."

[2]*Clay v. United States*, 403 U.S. 698 (1971), reversing Muhammad Ali's conviction for failure to submit for induction into the Armed Forces.

B. Chronology of the Tax Investigation:

1. The General Non-Criminal Tax Audit:

In May of 1971, Revenue Agent, Allan Summerville was assigned to begin a field audit of Senator Johnson's tax return for 1969. (TR, VOL. II, VII, 101).** On June 1, 1971, Agent Summerville contacted Johnson and arranged an appointment at Senator Johnson's office for June 17, 1971, (Tr, VOL II, VII, 107).

Between June 17, 1971, and August 26, 1971, Agent Summerville made numerous contacts with Johnson. On August 26, 1971, Agent Summerville informed Senator Johnson that there appeared to be an understatement of income for the tax year 1970 in the amount of $57,531.53.

According to Summerville, Johnson replied that the figures could not be right, that he could understand $4,000 or $5,000, but not that much (Tr. VOL II, VII, 117, 118, 120); (VOL IV, 46). Summerville testified that Johnson was cooperative and courteous throughout the investigation (TR, VOL IV, II, 47).

On October 20, 1971, Agent Summerville filed a referral report with the Intelligence Division, Internal Revenue Service, in which he indicated that Johnson should be further investigated for tax fraud (Tr, VOL IV, II 44).

**The first Roman numeral is the number on the outside of the transcripts; the second is the typed volume number on the inside. The numbers do not correspond, and were apparently mis-numbered when transmitted to the Court of Appeals.

2. The Criminal Investigation for Tax Fraud

On November 15, 1971, Special Agent R. F. Jackson contacted Johnson and advised him of his Constitutional rights (Tr, VOL II, VII, 147). Special Agent Jackson obtained Johnson's receipt books, cancelled checks, and bank statements for 1969 and 1970 (Tr. VOL II, VII, 153; VOL II, 157).

On January 27, 1972, Special Agent Wise took over the investigation (Tr, VOL II, 86). Special Agent Wise met with Johnson seven or eight times during the year and obtained Johnson's financial records. Special Agent Wise testified that Johnson "was cooperative" *(Ibid).*

Special Agent McMakin was assigned the Johnson case in September of 1972 and, after discussing and reviewing the case with other agents, conducted his first interview with Johnson on October 20, 1972, (Tr, VOL I, 87). Special Agent McMakin informed Senator Johnson that he would be heading the investigation and advised him of his Constitutional rights (Tr, VOL I, 88). At that initial meeting, Special Agent McMakin had Senator Johnson identify a check spread which had been prepared by Internal Revenue Agents (TR, VOL I, 89). He engaged Senator Johnson in conversation about the check spread and other matters pertaining to the criminal investigation (Tr, VOL I, 90-113).

On April 11, 1973, Special Agent McMakin and Revenue Agent Summerville again met with Senator Johnson (Tr, VOL I, 113). The purpose of that meeting was to interrogate Senator Johnson about "his acquisition of various assets during the investigative

years" (TR, VOL I, 113). Senator Johnson was again advised of his Constitutional rights *(Ibid)*. McMakin requested and Senator Johnson provided his cancelled checks for the tax year 1968 (Tr, VOL I, 114).

On May 29, 1973, Special Agent McMakin made his final visit to Senator Johnson's office (Tr, VOL I, 134). The purpose of that visit was to have Senator Johnson go through the net worth summaries which had been prepared by Special Agent McMakin and Revenue Agent Summerville (Id. 134-139).

On July 31, 1973, a formal conference was held between representatives of the Internal Revenue Service and Senator Johnson.

On August 24, 1973, two years and two and a half months from the commencement of the audit on June 1, 1971, Special Agent McMakin recommended that Senator Johnson be criminally prosecuted under "Section 7201, I.R.D., 1954, for willful attempt to evade his personal income tax for each of the years 1967, 1968, 1969 and 1970" (Final Prosecution Report, at 20; Tr, VOL II, VII, 41).

3. The Statement, Its Making and Delivery

On November 1, 1973, E. A. Isakson, a wealthy real estate speculator in Atlanta, was contacted by agents from the Internal Revenue Service about a possible deficiency of $108,000. Mr. Isakson was also experiencing difficulties with the Department of Justice, which had recently won a suit against him for violating the Fair Housing Act of 1968 (Tr, VOL V, VII, 6).

On November 6, 1973, Senator Johnson contacted Mr. Isakson and asked to see him (Tr, VOL II, 185). A meeting was arranged and Senator Johnson visited Isakson the next day, November 7, 1973 (TR, VOL II, 186). At the meeting, the possibility of Isakson providing an affidavit which Senator Johnson could submit to the Internal Revenue Service was discussed.

On November 16, 1973, Senator Johnson and his attorney, Robert Loftis, a former employee of the Internal Revenue Service, and a tax lawyer, met with Isakson in his office and questioned Isakson about the proposed statement (Tr, VOL II, 192-95).

On November 21, 1973, Isakson had a conference with his lawyer who in turn notified the United States Attorney (TR, VOL II, VII, 216-17).

On November 22, 1973, after a call from the United States Attorney, Special Agent McMakin contacted Isakson (Tr, VOL II, VII, 218; Tr, VOL IV, II, 195-96).

Special Agent McMakin obtained a letter from the Assistant Attorney General, Henry Peterson, which purported to authorize consensual eavesdrop or electronic monitoring of conversations between Senator Johnson and Isakson. (Tr, VOL V, III, 105). Agent McMakin also arranged to provide Isakson with assurances of non-prosecution and ordered Isakson to sign the affidavit which was presented to him on November 29, 1973, by Senator Johnson (Tr, VOL V, III, 35).

The affidavit signed and sworn to before a Notary Public by Isakson provided in pertinent part, that:

> "During the year 1969, I made several gifts to Senator Johnson, in varying amounts during the

year. These gifts were in cash and were made out of my personal funds." (G Exh 82-7)"

The Government contended in its response to the motion for a bill of particulars that the affidavit was "false in toto" (R. 104). However, the affidavit is truthful in all other respects. Isakson had known Senator Johnson since 1967; had worked with Senator Johnson in the past on matters of mutual interests; had made gifts of money to political figures over the years; had given Senator Johnson $1,000 in September 1973 for his mayoralty campaign (Tr, VOL IV, II 184-86). Moreover, on the morning of November 7, 1973, when Senator Johnson visited Isakson about making the statement, Isakson loaned Senator Johnson $5,000 (Tr, VOL IV, II, 190).

On December 3, 1973, Attorney Loftis delivered six (6) affidavits to Lawrence A. Weisensee, who was then an attorney in the Chief Counsel's Office, Southeast Region, Internal Revenue Service (Tr, VOL II, 176-77). Mr. Weisensee, pursuant to instructions, notified his supervisor, and then gave the affidavits to the Intelligence Division (Tr, VOL II, 182). The Isakson affidavit was one of the six.

Through a series of wire or radio intercepts of conversations which the Special Agent McMakin had urged Isakson to have with Senator Johnson, the Special Agent attempted to secure evidence of wilfulness against Senator Johnson.***

***con't–(VOL V, III, 101). The fifth interception, December 26, 1973, was of a face to face conversation between the two men in which Isakson was wired to a tape recorder (VOL II, VII, 194; VOL V, III, 100-101).

4. The Indictment, Prosecution, and Acquittal of Senator Johnson for Alleged Tax Fraud

Senator Johnson was indicted on May 7, 1974 (R. 7). The indictment was in five counts. Count one charged Senator Johnson with filing a false and fraudulent joint tax return on behalf of himself and his wife for the calendar year 1967 in violation of §7201, I.R.C. (26 USC §7201). Count two charged the same offense for the year 1968; count three charged the year 1969; and count four charged the year 1970 (R. 708). Count five charged Senator Johnson with making a false, fictitious and fraudulent statement and using a false writing and document by causing the false affidavit of E. A. Isakson, dated November 29, 1973, "to be submitted" to the "Internal Revenue Service in connection with an investigation and audit being made by said Internal Revenue Service of [Senator Johnson's] Income Tax Returns for 1969." (R. 10).

On November 14, 1974, counts one and two of the indictment were verbally dismissed on motion of Senator Johnson for severance (R. 4). On January 29, 1975, a jury found Senator Johnson not guilty of the charges laid in counts three and four for tax fraud and found him guilty of the false statement charge, under count five of the indictment (R 443).

The Government's proof as to the tax counts failed to show that Senator Johnson had understated his income. On the contrary, the evidence showed that he had been the victim of very shoddy accounting procedures by the Special Agents and was entitled to a refund (Tr, VOL VIII, VI 77-84; 129-130).

5. The Affirmance of the Conviction in the Fifth Circuit:

The Fifth Circuit rejected petitioner's contention that the statement was not a material one. The Court of Appeals ruled that the statement was material and stated:

> "The natural and probable tendency of the affidavit to influence the decision to be made must be judged by the content of the document itself and not by any special knowledge possessed or acquired by the Service. Had the Isakson affidavit been true, the discrepancies between income and reported and alleged income received might have disappeared. Johnson's tax liability for 1969 might have been reduced or eliminated, and no prosecution would have occurred. That no amount was specified in the affidavit does not mean that the affidavit was not material; to the contrary, it gave Johnson the greatest leeway to explain the source of his income." [Footnote omitted] (Appendix A, 3).

The Court of Appeals also rejected petitioner's other contentions that the statement fell within the "exculpatory no" exception and that the indictment was defective due to its failure to allege materiality. *(Id).*

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION IN THIS CASE IS CONTRARY TO THE PRINCIPLES ESTABLISHED IN *BRONSTON v. UNITED STATES*, 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973).

It has been more than twenty years since this Court last authoritatively construed the much-used false statement statute, 18 United States Code, Section 1001. The decision of this Court in 1955, *United States v. Bramblett*, 348 U.S. 503, 75 S. Ct. 504, 99 L. Ed 594, merely held that the statute, as amended in 1934 and revised in 1948, included within its ambit the submission of a false or fictitious statement to the House Disbursing Officer of the House of Representatives. The argument in *United States v. Bramblett, supra*, was that the House Disbursing Officer to whom a former member of Congress had submitted a certification that a certain female employee, who hopefully could type, was entitled to compensation, did not constitute a department or agency of the United States within the meaning of the statute.

The construction which this Court had placed upon the reach of the 1934 amendment in *United States v. Gilliland*, 312 U.S. 86, 61 S. Ct. 85 L. Ed 598 (1948), was left intact. There, this Court had construed Section 1001 to be unlimited with respect to the kinds of statements punishable. As the Court stated:

"The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction." (312 U.S. at 93)

The most recent case in which this Court considered Section 1001 was *Bryson v. United States*, 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed 2d 264 (1969). There, the Court adhered to *Gilliland/Bramblett* formulation with this statement:

"As another element of the offense, §1001 requires that the false statement be made 'in any matter within the jurisdiction of any department or agency of the United States'. Petitioner argues that if §9(h) was unconstitutional, then the affidavit requirement was not within the 'jurisdiction' of the Board, and therefore the false statement was not punishable under §1001. Because there is a valid legislative interest in protecting the integrity of official inquiries, [footnotes and citations omitted], we think the term 'jurisdiction' should not be given a narrow or technical meaning for the purposes of §1001,

[citations omitted]

A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under §1001." (396 U.S., at 70-71).

However, the open-ended, all-inclusive punishment of all statements submitted to an agency or department of the United States, sanctioned by these decisions, is

contrary to emerging principles mediating the rigors of perjury prosecutions.

In *Bronston v. U.S.*, 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed 2d 568 (1973), this Court held that a statement which was literally true but otherwise false could not support a perjury conviction under 18 United States Code, Section 1621. The prosecution of Bronston resulted from the answers which he gave to certain questions during the course of a hearing before a referee in bankruptcy. The interrogation which led to the prosecution was as follows:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

"A. No, sir.

"Q. Have you ever?

"A. The company had an account there for about six months, in Zurich.

"Q. Have you any nominees who have bank accounts in Swiss banks?

"A. No, sir.

"Q. Have you ever?

"A. No, sir." (409 U.S., at 354)

Bronston's answer as to whether he himself had ever had a Swiss bank account was both false and unresponsive. He had previously had such an account on which he drew checks totaling more than $180,000, but Bronston did not have such an account at the time he was questioned.

The Court construed Section 1621 "not to make it a crimin[illegible] act for a witness to willfully state any material

matters *that implies* any material matter that he does not believe to be true." (409 U.S., at 357) The Government, however, argued, "that the perjury statute should be construed broadly to reach" Bronston's answer. (409 U.S., at 358). The Court rejected the Government's argument for a number of reasons.

First, the Court was unwilling to construe the statute to express a Congressional intent that, "The drastic sanction of a perjury prosecution" [is a] cure to a testimonial mishap . . ." (396 U.S., at 358).

Second, the jury's finding that Bronston intended to mislead would not support an expansive construction of the statute, because to do so might deter witnesses from being forthcoming if they were confronted with the possibility of a perjury conviction based upon conjecture. (396 U.S., at 359).

Third, a perjury prosecution "is not the sole, or even the primary, safeguard against errant testimony." (409 U.S., at 360).

In this case, where the petitioner stands convicted of submitting a false statement which statement is both a literal and figurative blank, the protections afforded those accused of perjury are equally appropo.

First, the Congress could not possibly have intended to punish every *false* statement. Congress could only have intended to punish statements which intrinsically impede the functioning of Government. A statement, such as the one involved here, which was known to have been false when it was submitted and submitted long after the crucial decision to prosecute had been made could not conceivably have impeded the functioning of the Internal Revenue Service. Moreover, a

statement which did not mention any amount did not require the Internal Revenue Service to adjust its net worth *United States v. Holland*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954). Such an affidavit provided no element of a defense, since it did not indicate the amount of alleged understatement of income to be attributed to a non-taxable source.

Second, the Congress could not have intended that the drastic sanctions proscribed under Section 1001 be imposed upon a worthless statement. Neither could the Congress have intended that Section 1001 be invoked to punish a statement which at best in the scheme of a tax prosecution could only have constituted evidence of the taxpayer's state of mind. See *Bishop v. United States*, 412 U.S. 346, 93 S. Ct. 2008, 36 L. Ed. 2d (1973). The intent of Congress was not to punish mere evidence of wrongdoing but to proscribe the submission of statements which materially affected Government functioning.

Third, the false statement statute is not the sole safeguard against the submission of statements such as the one in this case. Rather, it is the tax prosecution itself in which such a statement might constitute evidence which impeaches the taxpayer's credibility or that of his witnesses. Surely, the submission of a statement at the close of a criminal tax audit which mentions no amount would leave little credence to an assertion at trial that in fact an amount was given.

The range of punishments which may be imposed for a violation of Section 1001 in comparison with those exacted for a perjury conviction, Section 1621, are so

drastic and harsh that this Court should grant certiorari and set contemporary standards as to the kinds of statements which may be punished under Section 1001. Under the latter statute, the accused may be imprisoned for 5 years, or fined $10,000, or both, while an accused under Section 1621 is faced with a fine of only $2,000, or 5 years, or both.

There are fewer protections available to an accused under Section 1001. There is no shield against self-incrimination. *Beckwith v. United States*, ____ U.S. ____, No. 74-1243, April 21, 1976, 44 U.S. Law Week 4499, and there is no two-witness rule. Moreover, in some circuits, the accused may be punished for immaterial statements as well as material ones. (See *infra*, at page 21, note 3.) In circumstances such as these, when the taxpayer is literally grist for the prosecutor's meat grinder, review in this Court is essential to assure that Section 1001 does not become the hand maiden of injustice.

This case is particularly appropriate for such review. Petitioner was a prime target for a politically motivated tax audit and prosecution. He is Black, a highly visible political figure within the Democratic Party; and he was identified with controversial and unpopular issues. Petitioner, more than any other single person, may be credited with bringing Muhammad Ali back into contention for the most highly sought prize in sports–The Heavyweight Championship of the World. These contentions and concerns have been fully documented by various Congressional Committees. See *New York Times*, "I.R.S. Kept Watch On 'Subversives' ", Monday, November 18, 1974, page 1.

II.

CERTIORARI SHOULD BE GRANTED, BECAUSE THE DECISION BELOW CONSTITUTES SUCH A DRASTIC DEPARTURE FROM THE STANDARDS OF MATERIALITY WHICH THE FIFTH CIRCUIT REQUIRES IN A SECTION 1001, 18 UNITED STATES CODE PROSECUTION, THAT IT DEPRIVES PETITIONER OF THE BENEFIT OF THE UNIFORM APPLICATION OF THE LAW AND, AS A BARE MINIMUM, PETITIONER'S CONVICTION SHOULD BE VACATED AND THE CASE REMANDED FOR AN EVIDENTIARY HEARING ON THE LIMITED ISSUE OF THE MATERIALITY OF THE STATEMENT

The grant of certiorari under the supervisory power of this Court is appropriate in this case. The decision in this case departs radically from other decisions of the Fifth Circuit on the issue of materiality.

The element of materiality is not expressly required under the second clause of Section 1001, upon which the indictment was laid in this case. However, for more than 25 years, the Fifth Circuit has interpreted the statute to require proof of materiality, as an element of the offense. *United States v. Moore*, 185 F.2d 92 (5th Cir. 1950); and *Rolland v. United States*, 200 F.2d 678 (5th Cir. 1953), *cert. denied*, 345 U.S. 964 (1953). See, also, *Conrad v. United States*, 255 F.2d 247 (5th Cir. 1958).[3]

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[3]The District of Columbia Circuit, the Sixth and Seventh Circuits have construed the second clause of Section 1001 to require materiality and have reversed convictions which did not

(continued)

The decision to affirm in this case is directly contrary to the decision of the Fifth Circuit in *United States v. Beer*, 518 F.2d 168 (5th Cir. 1975), and is contrary to the canons of statutory construction which mandate that penal statutes be strictly construed so as not to deprive litigants of due process of law in violation of the Fifth Amendment. The manifest lack of materiality of the alleged false statement in this case is far more apparent than the lack of materiality of the statement in *United States v. Beer, supra.*

The decision to affirm in this case was based upon a determination that materiality was supplied from the affidavit itself, even though the affidavit did not indicate the dollar amount of any loans or gifts which the affiant, Mr. E. A. Isakson, allegedly had made to the petitioner. (App. A. at 4). Despite the absence of any stated amount, the Fifth Circuit reasoned that, "Had the Isakson affidavit been true, the discrepancies between income reported and alleged income received *might have* disappeared, Johnson's tax liability for 1969 *might have* been reduced or eliminated and no prosecution would have occurred" (App. A. at 4) [Emphasis added]. It is an article of faith in our criminal justice system that guilt must be established on the basis of proof beyond a reasonable doubt and not on the basis of guesses, speculation, and conjecture as to what "might have" been proved or "might could

(footnote continued from proceeding page)

meet that standard. *Weinstock v. United States*, 231 F.2d 699 (DC Cir. 1956); *United States v. Erhardt*, 381 F.2d 173 (6th Cir. 1967); and *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960). The Second Circuit, however, does not require proof of materiality in a prosecution under the second clause of the statute. *United States v. Marchisio*, 344 F.2d 653 (2nd Cir. 1965).

have been" proven. The Fifth Circuit's determination that the Isakson affidavit was material reflects a misperception of the materiality concept in a Section 1001 prosecution.

Materiality, a requirement read into the statute, is defined most often through reference to the discussion in *Weinstock v. United States, supra*, at 701-02. "To be 'material' means to have probative weight, i.e. reasonably likely to influence the tribunal in making a determination required to be made . . . Materiality must be judged by the facts and circumstances in the particular case." Under this formulation, a statement, such as Isakson's affidavit, may be "relevant" but not material. Obviously, Isakson's affidavit was related to the issue of alleged understatement of income and was, thus, "relevant" in that sense. However, materiality is a matter of substantive law, and in this sense the statement was immaterial, because it could not affect the Internal Revenue Service's net worth calculations.[4]

[4]The statement is immaterial by every recognized definition of materiality.

Materiality is more generally defined as:

> "(1) . . . 2a(1) being of real importance of great consequence; substantial . . . (2) ESSENTIAL . . . (3): RELEVANT, PERTINENT . . . b: requiring serious or probable bearing on the proper determination of a law case or on the effect of an instrument or some similar unsettled matter." Webster's *Third New International Dictionary* (Unabridged, 1961), at 1392.
>
> "(2): . . . important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form." Black's, *Law Dictionary*, (4th Edition), at 1128.

(continued)

In *United States v. Beer, supra,* the Fifth Circuit, in an opinion authored by Judge Coleman, found that the broad, inclusive language of the statute was required by the Congressional intent of preventing a ". . . multitude and variety of deceptive practices which ingenious individuals might perpetrate upon an increasingly complex governmental machinery." (518 F.2d, at 170). Section 1001 has existed in various forms for over a century. It was enlarged from a discreet, specifically worded statute directed at false pecuniary claims against the government into what the Fifth Circuit has described as a ". . . pervasive, all encompassing statute . . ." enacted to deter persons from supplying false information to regulatory departments. *United States v. Beer, supra,* at 170. Thus, the Fifth Circuit has adhered to a practice of being *"extremely careful to insure that reasonable limits are observed"* with respect to the application of Section 1001 (518 F.2d, at 170) [Emphasis added]. The strict scrutiny to which the Fifth Circuit has subjected applicants of Section 1001 reflects that court's attempt to reconcile the "pervasive, all encompassing" character of the statute with the "canon of construction that criminal statutes are to be strictly construed" (518 F.2d at 170).

The statute in its present form was intended to encompass statements which involved no pecuniary loss

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(footnote continued from proceeding page)

On the other hand relevance is defined as:

". . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Federal Rules of Evidence.

to the government but which due to their falseness perverted the function of some government agency. See, *United States v. Gilliland, supra.* Because of the broadness of its terms and the harshness of the sentence, the Fifth Circuit has restricted its impact by reading the requirement of "materiality" into the statute. *United States v. Krause,* 507 F.2d 113, 118 (5th Cir. 1975); and *United States v. Lambert,* 501 F.2d 943, 964 (5th Cir. 1974). As noted in *United States v. Krause, supra,* many statements, while false, have been held to fall beyond the parameters of Section 1001. And, using the doctrines discussed above, many statements have been found to be immaterial and not within Section 1001, if their effect and impact upon the functioning of a government agency was inconsequential. The policy guidelines under which the Internal Revenue Service operates with respect to recommending criminal prosecution are very strict, and criminal prosecution of the petitioner would have proceeded under those guidelines regardless of the submission of the Isakson affidavit on December 3, 1973, more than three months after the Special Agent had concluded his investigation and recommended criminal prosecution on August 23, 1973. The guidelines for criminal prosecution are presented in Policy Statement P-9130-1, which provides:

> *"Criminal prosecution will be recommended in every case* developed by the Intelligence activity involving an offense against the internal revenue laws where:
>
> (a) The evidence is sufficient to indicate guilt beyond a reasonable doubt; and

(b) A reasonable probability of conviction exists." [Emphasis added].

When this case is compared with the facts in *United States v. Beer, supra*, the miscarriage of justice which results from affirmance of petitioner's conviction becomes apparent. In *Beer*, defendant, a bank president, gave a false answer on a Federal Deposit Insurance Corporation (FDIC) Officer's Questionnaire. Beer was a part-owner of an airplane bought with a loan obtained from the bank where he held office. He acted as the loan officer for two loans granted to the co-owner of the airplane. There were no specific indications of any collateral for the loans on the bank documents, except rather general notations, "Trust Agreement," and "Bonds." In response to a question asking if Beer knew of any extensions of credits for the accommodation of persons whose names did not appear on the bank's records or on credit instruments used in connection with such transactions, Beer answered "no", although Beer himself was just such a person. Beer's answer thereby concealed a material fact from the Bank Examiner and thereby frustrated the functioning of the FDIC to make accurate determination of the condition of the bank and the involvement of bank officers in any self-dealings.

Nevertheless, the Fifth Circuit held that Beer could not be convicted under Section 1001, although it found that Beer's affirmative, aggressive and voluntary statement was obviously false at the time made. The court said even if the FDIC Bank Examiner had been given a true answer the transaction was not sufficiently

unorthodox to authorize the FDIC to cancel the bank's federal deposit insurance. In other words, the transaction, even if known to exist by the FDIC when it received the questionnaire, was not material as it had no capacity to affect the functioning of the FDIC (518 F.2d, at 172).

This is directly analogous to this case. The IRS knew of the existence of the contents of the affidavit, and its lack of veracity, before they actually received the document. If, in *Beer*, a false statement *not known* by the government to be false was immaterial, as it could not have affected government functioning, in this case a false statement *known* to be false by the government *must* be immaterial, since it also could not affect government functioning.

The IRS never seriously considered nor relied upon the Isakson affidavit. The IRS was *not* misled to believe that Isakson had made loans or gifts to the petitioner. Therefore, the statement did not and could not have resulted in re-allocation or misdirection of the Service's investigation, as petitioner contended, or as giving petitioner the greatest possible leeway to explain the sources of his income and therefore of the greatest consequence, as the Court (Fifth Circuit) held. The fact remains that the Isakson affidavit was immaterial throughout the government investigation and prosecution. In footnote 4 of its opinion, the Fifth Circuit asserts in a conclusory manner that the fact the affidavit was never used during the investigation or at trial "does not destroy the materiality of the statement had it been true at a point in time when the IRS was attempting to decide whether

to prosecute Johnson" (App. A. at 4). Such a conclusory assertion falls far short of the *Beer* requirement that the government must "*show* that the statement had the capacity to influence a determination required to be made" (518 F.2d, at 170) [Emphasis added]. In this case, as in *Beer*, the record "reveals no evidence of how the particular statement here could have affected any decision of the" IRS (518 F.2d, at 172).

There is no way to rationally reconcile the outcome in *Beer* with the decision in this case. The statement set forth no amount and, thus, the agency was not required to adjust its net worth calculations or check-out leads. Moreover, even if the amount of $5,000.00 had been set forth, as suggested by the government, it would not have been sufficient to have altered the IRS's decision to recommend that petitioner be criminally prosecuted, since the amount of alleged understatement of income for the year 1969 was well in excess of $15,000.00. A statement such as the Isakson affidavit cannot be objectively demonstrated to have had an actual effect upon the functioning of the IRS in pursuing a re-computation of the sums it had wrongfully accused petitioner of withholding or in investigating false leads.

Nonetheless, the Fifth Circuit reasoned that if the Isakson affidavit had been true, Petitioner would have been given "the greatest leeway to explain the source of his income" (App. A. at 4). Or, in other words, an objective standard of materiality is replaced by a subjective one which, despite the fact that the affidavit mentioned *no* dollar amount on its face and the IRS actually knew that the affidavit was false, rendered the affidavit material on the notion that petitioner might

tell other lies in the future in support of the false declarations in the Isakson affidavit. If such a standard had been applied in *Beer*, rather than the customary Fifth Circuit objective standard used in cases arising under Section 1001 of narrowing the parameters of the statute to avoid the harshness and rigor of the statute, Beer would have been found guilty. The document which Beer presented to the FDIC contained an answer that everyone, as far as the facts given reveal, conceded was false, used and relied upon by the FDIC, since it had no knowledge of its falsity when it was voluntarily presented.

In *Beer*, as opposed to this case, the Fifth Circuit, as pointed out in the sections of its opinion remarking on the history of the statute, followed the usual Fifth Circuit course to narrowly construe the statute to avoid the severeness of the full penalty of Section 1001 from being applied to an act which, although false, was entirely inconsequential to any agency decision. Whether one interprets an affidavit without a specified sum as being of no consequence in the agency's function, is immaterial as a matter of law. As was said in *Beer*, "If the functioning of a department or agency would not have been materially affected had it relied upon the statement, then the statement must necessarily be immaterial" (518 F.2d, at 172). The Fifth Circuit's failure to adhere to this standard requires this Court to grant certiorari under its supervisory power. Such a radical departure in standards brings shame on the criminal justice system and to some is even *racially* suspect.

As a bare minimum, this Court should vacate the judgment of conviction and remand for a determination on the basis of evidence what affect, if any, the Isakson affidavit had upon the functioning of the Internal Revenue Service. *Beer* requires evidence which reveals the manner in which the agency functioning was affected by the allegedly false statement. Remand would be consistent with the principle that every element of a criminal offense must be established by proof beyond a reasonable doubt. In a Section 1001 prosecution, materiality is determined by the court. See, *Sinclair v. United States*, 279 U.S. 263 (1929). Thus, the issue of whether or not the agency functioning was in fact affected by the Isakson affidavit may be determined expeditiously by the trial judge without a jury. See, *Alderman v. United States*, 394 U.S. 164, at 186 (1969).

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the petitioner prays a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

DATED: June 9, 1976.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Leroy R. JOHNSON,
Defendant-Appellant.

No. 75-2993.

United States Court of Appeals,
Fifth Circuit.

April 15, 1976.

Defendant was convicted before the United States District Court for the Northern District of Georgia, Newell Edenfield, Chief Judge, of providing a materially false affidavit to the Internal Revenue Service in the course of an investigation of criminal tax fraud, and he appealed. The Court of Appeals, Dyer, Circuit Judge, held that fact that the affidavit, which had been furnished to the signer by defendant and which stated that the signer had made cash gifts to defendant in varying amounts, contained no statement of the amount of the gifts did not mean that it was not material to the investigation on ground that it could not have affected net worth calculations, that fact that Internal Revenue Service knew that the affidavit had been solicited and had reason to believe that its contents were false did not establish that it was immaterial to the decision to prosecute for tax fraud, that fact that affidavit was not used at trial to refute the alleged tax liability did not destroy the materiality of the statement and that submission of the affidavit did not fall within the "exculpatory 'no' " exception.

Affirmed.

1. Fraud 68.10(4)

Materiality is an element of offense of making or using any false writing or document in any matter within the jurisdiction of any department or agency of the United States knowing the same to contain any false, fictitious or fraudulent statement or entry; for such purposes "materiality" requires that the statement have a natural tendency to influence or be capable of

influencing the decision of the tribunal in making a required determination. 18 U.S.C.A. §1001.

See publication Words and Phrases for other judicial constructions and definitions.

2. Fraud 68.10(4)

Fact that affidavit, which defendant furnished to Internal Revenue Service and which stated that the signer had made cash gifts to defendant in varying amounts during years at issue in criminal tax fraud investigation, contained no statement of the amount of the gifts did not establish that the affidavit, which was false, was not "material," within meaning of the false statement statute, on ground that it could not have affected the IRS' net worth calculations, since absence of specified sum gave defendant the greatest leeway to explain the source of his income. 18 U.S.C.A. §1001.

3. Fraud 68.10(4)

In a prosecution under the false statement statute, the natural and probable tendency of a false statement or affidavit to influence a government decision to be made must be judged by the content of the document itself and not by any special knowledge possessed or required by the agency involved. 18 U.S.C.A. §1001.

4. Fraud 68.10(4)

Fact that investigating agent's report recommending prosecution for tax evasion was submitted prior to time defendant furnished false affidavit of cash gifts did not mean that the affidavit was immaterial to the decision to prosecute and, hence, that defendant could not be

found guilty of violating the false statement statute, notwithstanding that the Government knew that the affidavit had been solicited by defendant and had reason to believe that its contents were false, since had affidavit been true the discrepancies between income reported and alleged income received might have disappeared; also, decision to prosecute was not made final until sometime after the affidavits were submitted to the regional counsel's office and a supplemental investigation was conducted. 18 U.S.C.A. §1001.

5. Fraud 68.10(4)

Fact that false affidavit of cash gifts was not used at trial to refute charges of criminal tax fraud did not destroy the materiality of the affidavit for purposes of prosecution under the false statement act since materiality was to be measured at time the Government was attempting to decide whether to prosecute. 18 U.S.C.A. §1001.

6. Fraud 68.10(1)

Statute proscribing the making of any false statement within the jurisdiction of any department or agency of the United States or the submitting of any false writing or document does not apply to mere answers, including untruthful ones, to a government investigator's questions. 18 U.S.C.A. §1001.

7. Fraud 68.10(1)

Submission to Internal Revenue Service, which was conducting criminal tax fraud investigation, of false affidavit of cash gifts did not fall within the

"exculpatory 'no'" exception to the false statement statute since defendant affirmatively and voluntarily misrepresented a material fact and did not merely give untruthful answers to investigator's questions. 18 U.S.C.A. §1001.

Appeal from the United States District Court for the Northern District of Georgia.

Before DYER and CLARK, Circuit Judges, and KRAFT*, District Judge.

DYER, Circuit Judge:

Johnson appeals his jury conviction for violating 18 U.S.C.A. §1001[1] by providing a materially false affidavit to the Internal Revenue Service (IRS) in the course of an investigation of criminal tax fraud. We affirm.

In May, 1971, the IRS began a field audit of Johnson's tax returns for 1969. During this audit, discrepancies were found between the amount of Johnson's bank deposits and the amount of income that he reported to the Service in 1969 and 1970. Johnson was confronted with the discrepancies, but was unable to identify all the non-income deposits. As a result, a

---

[1]Section 1001 provides in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

criminal tax fraud investigation was begun by the Service.

During the investigation, IRS agents met with Johnson on various occasions, advising him of his constitutional rights three different times. Following these meetings the agent responsible for the investigation recommended to his superior on August 24, 1973, that Johnson be prosecuted for willfully attempting to evade personal income taxes for the taxable years 1967 through 1970.

About two months later, two attorneys representing Johnson met with counsel from the Criminal Tax Section of the IRS Regional Counsel's office. During this conference, one of Johnson's attorneys stated that during the taxable years in question, Johnson had received gifts which would explain the inconsistencies in the tax audit. He further stated that he wished to produce affidavits from the various donors to identify the amounts and dates of the gifts.

On November 7, 1973, Johnson met with E. A. Isakson and asked him to submit an affidavit stating that he had made gifts to Johnson in 1969 and 1970 in the amount of $5,000 even though Isakson had never made such donations. Two weeks after this meeting Isakson told his attorney of Johnson's request. The attorney notified the United States Attorney who then contacted the special IRS agent in charge of the criminal investigation.

On November 29, 1973, Isakson signed an affidavit furnished to him by Johnson which stated that he had made cash gifts to Johnson in varying amounts in 1969. Four days later, an attorney representing Johnson delivered this and five other affidavits to the IRS

Regional Counsel's office. These six affidavits were turned over to the Intelligence Division of the IRS which then conducted a supplemental investigation.

On May 7, 1974, Johnson was indicted. In Counts I-IV he was charged with filing false and fraudulent tax returns for the years 1967 through 1970. In Count V he was charged with the §1001 violation as a result of the submission of the Isakson affidavit.

Counts I and II were withdrawn by the government after the district court severed them from the trial on the other counts. Johnson was acquitted on Counts III and IV, but was found guilty on Count V. This appeal ensued.

[1-5] Johnson first argues that the false affidavit was not material[2] to the IRS investigation because it was not intrinsically capable of influencing the decision to prosecute.[3] He reasons that since the affidavit contained no statement of the amount of the gift, it could not have affected the net worth calculations made by the Service in the investigation. He further argues that the decision to prosecute was "final for all practical purposes" when the investigating agent submitted his report on August 24, 1973; therefore, the Isakson affidavit was immaterial to the decision to prosecute.

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[2]Although the second clause of §1001 does not contain a materiality requirement, we have held that one exists. *Rolland v. United States*, 5 Cir. 1953, 200 F.2d 678.

[3]Materiality for §1001 purposes has been defined to mean "whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *Weinstock v. United States*, 1956, 97 U.S.App.D.C. 365, 231 F.2d 699, 701-02.

This is especially true, Johnson says, because the Service knew that it had been solicited and that, according to the affiant Isakson, its contents were false.

We disagree. The natural and probable tendency of the affidavit to influence the decision to be made must be judged by the content of the document itself and not by any special knowledge possessed or acquired by the Service. Had the Isakson affidavit been true, the discrepancies between income reported and alleged income received might have disappeared, Johnson's tax liability for 1969 might have been reduced or eliminated, and no prosecution would have occurred. That no amount was specified in the affidavit does not mean that the affidavit was not material; to the contrary, it gave Johnson the greatest leeway to explain the source of his income.[4] Finally, the decision to prosecute was not made final until sometime *after* the affidavits were submitted to the Regional Counsel's office on December 3 and a supplemental investigation was conducted.[5]

[6, 7] Johnson next contends that the submission of the affidavit falls within the "exculpatory 'no'" exception to Section 1001. *United States v. Bush*, 5

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[4]The affidavit, of course, was not used at trial to refute the alleged 1969 tax liability. But that does not destroy the materiality of the statement *had it been true* at a point in time when the IRS was attempting to decide whether to prosecute Johnson.

[5]If Johnson's argument that the decision to prosecute was made on August 24, were true, it is curious that his counsel bothered to meet with IRS counsel after that date and why the Isakson affidavit and the five accompanying it were solicited and submitted.

Cir. 1974, 503 F.2d 813; *Paternostro v. United States*, 5 Cir. 1962, 311 F.2d 298. While it is true that Section 1001 does not apply to mere answers, including untruthful ones, to investigators' questions, this is not such a case. The IRS did not solicit the affidavit; Johnson took the initiative in proffering it through his attorney. Johnson knew of the criminal investigation and had been given *Miranda* warnings on several occasions. Nonetheless, he affirmatively and voluntarily misrepresented a material fact in order to convince the Service not to prosecute. On these facts, the exception is unavailable.

Finally, Johnson argues that Count V of the indictment was insufficient to state an offense under Section 1001. We find this argument to be without merit.

AFFIRMED.

APPENDIX "B"

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 00-0000

LEROY R. JOHNSON,
Petitioner,
versus

UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF HOWARD MOORE, JR.

State of California)
) ss.
County of Alameda)

Personally appeared HOWARD MOORE, JR., before the undersigned Notary Public and being first duly sworn and placed upon oath, deposed and said as follows:

1. I am a practicing attorney duly licensed in the State of California, and I maintain a regular office for the practice of law under the partnership name MOORE AND BELL, whose offices are located at 160 Franklin Street, Suite 300, Oakland, California, 94607.

2. I am a member of the Bar of the Supreme Court of the United States, having been admitted in November of 1966.

3. I was one of the attorneys who represented the movant, LEROY R. JOHNSON of Atlanta, Georgia, at his trial in the United States District Court for the Northern District of Georgia, Atlanta Division, and I was subsequently designated the principal attorney to prosecute movant's appeal to the United States Court of Appeals for the Fifth Circuit.

4. The movant was appealing his conviction for an alleged violation of 18 United States Code, Section 1001.

5. On March 12, 1976, the appeal was argued orally before a panel of the United States Court of Appeals for the Fifth Circuit, sitting in New Orleans, Louisiana.

6. On Thursday, April 15, 1976, the Court of Appeals released its opinion, affirming movant's conviction, which opinion is appended to the Petition for Writ of Certiorari, marked Exhibit "A."

7. On Monday, April 19, 1976, a copy of the opinion of the Court of Appeals was received at my law offices in Oakland, California. There is no Saturday mail delivery at my law offices.

8. On Friday, April 23, 1976, I called the Criminal Appeals Expediter for the United States Court of Appeals for the Fifth Circuit, Mr. George Bauer, in New Orleans, Louisiana, and indicated that I needed a short extension of time in which to file a petition for rehearing on behalf of movant from April 29, 1976, to and to include May 11, 1976. Mr. Bauer indicated that such an extension would be reasonable. Accordingly, I prepared a motion for such an extension and caused an original and three copies to be mailed to the Court on April 23, 1976. A copy of my letter confirming my telephone conversation with Mr. Bauer is appended to this affidavit, marked Exhibit "1", and a copy of the motion requesting the enlargement of time is appended hereto, marked Exhibit "2".

9. On Sunday, May 9, 1976, I forwarded via air express to the Court of Appeals an original and 24 copies of the movant's petition for rehearing and suggestion for rehearing *en banc*.

10. On Monday, May 10, 1976, the petition for rehearing was received by the Court of Appeals in New Orleans and received one full day prior to the date on which it would have been due had the original motion for an extension of time in which to file said petition from April 29, 1976, to and to include May 11, 1976, been granted.

11. Upon receipt of the petition for rehearing, a deputy clerk of the Court of Appeals called me in Oakland, California, and advised that the original motion for an extension had not been received and that the mandate of the Court of Appeals had issued on May 7, 1976. The deputy further advised me to file a motion for recall of the mandate and for stay and for

leave to file the petition for rehearing out of time. Accordingly, on May 10, 1976, I prepared both motions and mailed an original and three copies to the Court of Appeals.

12. On May 21, 1976, after the time in which a petition for writ of certiorari could have been filed, Judge Dyer, who authored the opinion affirming movant's conviction, entered an order on behalf of the Court of Appeals denying both motions. A copy of that order is appended hereto, marked Exhibit "3".

13. Pursuant to my request to the United States Postal Service to trace and locate the mail which I sent to the Court of Appeals on April 23, 1976, the U.S. Postal Service returned its official Form 1510, which shows that the original motion for an extension of time in which the petition for rehearing was actually received by the Court of Appeals. However, the Form does not indicate the date on which the motion was received. A copy of U.S. Postal Form 1510 is appended hereto, marked Exhibit "4".

14. Upon receipt of U.S. Postal Form 1510 and the order of the Court of Appeals, Exhibit "5", I filed a motion for reconsideration of the order of May 21, 1976. On Thursday, June 3, 1976, the Court of Appeals denied the motion for reconsideration, which order is appended hereto, marked Exhibit "5".

15. Petitioner has diligently attempted to perfect his right to rehearing and has not slept upon his rights. A petition for rehearing is not an absolute prerequisite to the filing of a petition for writ of certiorari; however, it is customary to do so, and this Court has held that the thirty (30) day period for filing a petition for writ of certiorari runs from the date of the denial

of the petition for rehearing, rather than the date of the judgment, and thereby extends the time in which a petition for certiorari may be filed. See, *United States v. Healey*, 376 U.S. 75, 84 S. Ct. 553, 11 L. Ed. 2d 527 (1964); and *Craig v. United States*, 298 U.S. 637 56 S. Ct. 670, 80 L. Ed. 1371 (1936).

16. This is an appropriate case for the relaxation of the time requirements set forth in Rule 22(2), Supreme Court Rules. This Court has in a number of cases held that the provisions of Rule 22(2), requiring the filing of a petition for writ of certiorari within thirty (30) days of the entry of final judgment, is not jurisdictional. *Durham v. United States*, 401 U.S. 481, 91 S. Ct. 28 L. Ed. 2d 200 (1971); *Schacht v. United States*, 398 U.S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970); *Taglianetti v. United States*, 394 U.S. 316, 89 S. Ct. 1099, 22, L. Ed. 2d 302 (1969); *Heflin v. United States*, 358 U.S. 415, 418 n.7, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959); and *Gondeck v. Pan Am World Airways*, 382 U.S. 22, 86 S. Ct. 229, 15 L. Ed. 2d 20 (1965).

In cases such as the ones just cited, the Court has applied the principle stated in *United States v. Ohio Power Co.*, 353 U.S. 98, 77 S. Ct. 652, 1 L. Ed. 2d 683, 685 (1957), that the, "interests of justice would make unfair the strict application of our rules." In this case, the interests of justice require the relaxation of the rules, in order to avoid punishing the petitioner for possible mishandling of his timely application for an extension of time in which to file his petition for rehearing. Relaxation of the strict application of the rules is compelled where, as here, petitioner's counsel obtained prior approval of the Clerk to grant the extension. The Clerk is expressly given such power to

provisionally grant such extension under Rule 10(a)(6), Fifth Circuit Rules, which provides:

> "Rule 10. Motions–(a) Clerk may rule on certain motions.–Clerk of this Court is authorized, in his discretion and subject to review by the Court, to take appropriate action for the Court regarding the following unopposed procedural motions. . . . (6) To extend time for filing petitions for rehearing for not longer than 30 days . . ."

17. This affidavit is made for the purpose of being offered in support of the jurisdictional allegations set forth in the within petition for writ of certiorari. The matters stated herein are based upon my own personal knowledge and are true and correct, and as to such matters stated upon information and belief, I believe them to be true and correct.

/s/Howard Moore, Jr.
HOWARD MOORE, JR.

Subscribed and sworn to before me
this 9th day of June, 1976.

/s/R. E. [illegible]
Notary Public

EXHIBIT "1"

MOORE AND BELL
ATTORNEYS AT LAW
THE LONDON BUILDING-THIRD FLOOR
160 FRANKLIN STREET
OAKLAND, CALIFORNIA 94607

April 23, 1976

Mr. George Bauer
Criminal Appeal Expediter
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: USA v. LEROY R. JOHNSON
No. 75-2993

Dear Mr. Bauer:

Pursuant to our phone conversation this afternoon, enclosed for filing please find an original and three copies of appellant's motion for enlargement of the time in which to file his petition for rehearing in this action from April 29, 1976, to and to include May 11, 1976.

Your courtesy is most appreciated.

Very truly yours,

HOWARD MOORE, JR.

HM/c

cc: Ms. Gale McKenzie
Edward T.M. Garland, Esquire
Leroy R. Johnson, Esquire

EXHIBIT "2"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 75-2993

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LEROY R. JOHNSON
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA-ATLANTA DIVISION

MOTION FOR AN ENLARGEMENT OF THE TIME IN WHICH TO FILE PETITION FOR REHEARING

Pursuant to Fifth Circuit, Rule 10(a)(6), LEROY R. JOHNSON, appellant in the within appeal, hereby moves the Court for an order extending the time in which he may file a petition for rehearing from April 29, 1976, through and including May 11, 1976. In support thereof, the appellant shows as follows:

1. On April 15, 1976, a panel of this Court announced its decision and entered its order affirming appellant's conviction for a violation of 18 United States Code, Section 1001.

2. Since the receipt of the opinion of this Court, counsel for appellant has been continuously engaged in the preparation of a brief for filing in the Court of Appeals of the State of California, First Appellant District, arising out of a protracted and complicated murder by torture trial, which brief has to be filed on or before May 1, 1976. As a result, counsel for appellant has not had sufficient time to adequately research and study the regulations of Internal Revenue Service and judicial decisions, which could result in a different decision than the one rendered herein. The outcome of this appeal is of the utmost importance to the appellant who is a practicing attorney.

3. No previous application for the relief sought herein has been made to this Court or any Judge thereof.

DATED: April 23, 1976.

Respectfully submitted,

HOWARD MOORE, JR.
Moore and Bell
Third Floor, 160 Franklin Street
Oakland, California 94607
(415) 451-0104

EDWARD T. M. GARLAND
Garland & Garland, P.C.
1012, Candler Building
Atlanta, Georgia 30303
(404) 577-2225

Attorneys for Appellant

By /s/ Howard Moore, Jr.
HOWARD MOORE, JR.

[CERTIFICATE OF SERVICE OMITTED]

EXHIBIT "3"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2993

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEROY R. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

O R D E R :

IT IS ORDERED that appellant's motion for leave to file a petition for rehearing and suggestion for rehearing en banc out of time is denied.

IT IS FURTHER ORDERED that appellant's motion for recall of the Court's judgment previously issued as mandate pending the disposition of his petition for rehearing and suggestion for rehearing en banc is denied.

/s/ [illegible]
United States Circuit Judge

EXHIBIT "4"

PS Form 1510 U.S. POSTAL SERVICE
Original–Part I Post Office at _____
ADDRESSEE: ZIP Code _____ Date May 14, 1976

Please state in the spaces below whether the article described on Part II has been delivered to you and then return both parts of this form in the enclosed OFFICIAL SELF-ADDRESSED ENVELOPE WHICH REQUIRES NO POSTAGE. Your response will help to improve the postal service.

POSTMASTER.

REPLY OF ADDRESSEE (Check one): ( ) REFUSED.

My records show that the article was: ( ) NOT RECEIVED. (√) RECEIVED. If any contents missing, list them:_____

_____

_____

_____value of missing articles, $_____

5-17-76 /s/George Bauer

PS Form 1510–Original–Part II Date 5-13-76

INQUIRY FOR THE LOSS OF RIFLING OF MAIL MATTER

Registered No. _____( )
(x) Letter Certified No. _____ ( )
( ) Parcel ___ Insured No. _____ ( )

( ) Ordinary. COD No. _____Amount due sender $_____
Envelope: (x) Long. ( ) Short. ( ) Business reply
Complaint Loss. Date mailed Apr. 23, 1976 5:00 Friday

Mailed at: Oakland 1st CA 94615

Where deposited Drop Boxes Civic Center Annex

Contents (describe fully) and value Legal Documents
No Market Monetary Value

_____(Fold here)

Sender: Law Offices
Moore & Bell

160 Franklin

Oakland Ca 94607

Addressee:
George, Bauer

600 Camp St.

New Orleans, LA 70130

FOR USE OF POSTAL SERVICE ONLY IN CASES OF LOST OR RIFLED UNREGISTERED LETTERS AND ALL LOST OR RIFLED REGISTERED AND CERTIFIED MAIL

The article described on the reverse of this form, if mailed at the time and place stated by the sender, was dispatched at _____ on _____

to _____in
package of letters bearing facing slip reading _____
and in pouch labeled to _____
or, IF REGISTERED, in _____
receipted for by _____
(The following spaces must be filled in at city delivery offices only.)
The letter was due to be collected by _____
and deposited at _____ on _____ at _____
If dispatched to a local distribution unit, show time _____
If for local delivery, show name of delivering employee _____
_____2

SENDER:

(x) Investigation has disclosed that the article described on the other side, part II, was received by the addressee.

( ) Investigation of your inquiry concerning the letter / parcel mailed by you on

_____, 19 ____, addressed to _____

_____

did not locate the article. In the event the article is later located or responsibility for the loss is established, you will be further advised.

( ) Application for a duplicate postal money order may be made at the post office 60 days after date of issue.

( ) Indemnity claim for unnumbered insured mail may be filed at the nearest post office. Please present this notice with mailing receipt and evidence of value (such as receipted bills, etc.).

POSTMASTER.

EXHIBIT "5"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2993

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEROY R. JOHNSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

O R D E R:

IT IS ORDERED that appellant's motion for reconsideration of order of May 21, 1976, denying appellant's motion for leave to file petition for rehearing en banc out of time is denied.

IT IS FURTHER ORDERED that appellant's motion for recall of the Court's judgment previously issued as mandate pending the disposition of his petition for rehearing and suggestion for rehearing en banc is denied.

/s/[Illegible]
United States Circuit Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

D. C. Docket No. 74-237-A-CR
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEROY R. JOHNSON,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

Before DYER and CLARK, Circuit Judges, and KRAFT*, District Judge.

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*Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 15, 1976

Issued as Mandate: May 7, 1976